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EXAMINER

MEHTA, BHAVESH M

ART UNIT PAPER NUMBER

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Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.
08/459,788

Applicant(s)
Harvey et al.

Examiner
David E. Harvey

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— The MAILING DATE of this communication appears on the cover sheet with the correspondence address —

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on Jun 18, 2002
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 35 C.D. 11; 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 5-34 is/are pending in the application.
- 4a) Of the above, claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 5-34 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claims _____ are subject to restriction and/or election requirements.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
*See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____ 6) ☐ Other: _____

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SECTION I:

During the present prosecution, many of the same issues have been raised in different ones of the many copending applications. In at least some cases, these issues appear to have been handled and addressed inconsistently between applications. Thus, the following "list" of positions taken by the examiner/Office in regard to such overlapping issues has been created, and will be maintained by the Office, in an attempt to ensure consistency in the way that these issues are handled between applications in the future.

THE EXAMPLES:

1) In lines 2-8 on page 142 of the amendment filed on 1/28/2002 in application SN 08/470,571, applicant suggests that the examiner has objected to the fact that applicant provided citations showing dual support for the claims with respect to both the 1981 and 1987 disclosures. No such objection has ever been raised by the examiner. To the contrary, the examiner found applicant's citations of dual support to be one of the most helpful aids that applicant has provided to date (i.e. when presented in the form of claim charts).

Having said this, the fact remains that examiner/Office was unquestionably misled by the many statements made by applicant concerning the "consequences" of Section 120 "priority". The reason that these statements misled the examiner/Office seems to be self evident from the statements themselves. For example, in the last 7 lines on page 24 of the Appeal Brief filed in SN 08/113,329 on 9/17/1996, applicant states:

"The case law makes clear that the only inquiry concerning claims filed in a subsequent continuation application pursuant to Section 120 is whether they are adequately supported in under Section 112, first paragraph, in the initial application. If the support exists, the inquiry is at an end."

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And statements made in the remarks section of many amendments in which applicant states:

“The present application claims priority under 35 USC §120 of the following applications.....Consequently, Applicants will demonstrate disclosure only with respect to the ‘81 case,...”

[e.g. see lines 9-21 on page 000507 of the Appendix in the document mailed on 9/10/01 in SN 08/474,139]

These statements misled the examiner/Office into believing that, as a consequence of Section 120, applicant was permitted to use the disclosure of his 1981 parent application alone, e.g. in place of the instant 1987 disclosure, to fulfill section 112 requirements when addressing/replying to Section 112 rejections. However, the examiner/Office now understands that, because applicant's past 1981 parent disclosure was not incorporated into the instant disclosure, the 1981 specification cannot be relied upon by applicant for showings of section 112 support when addressing/responding to rejections made under Section 112; i.e. all section 112 Support must come from the instant “1987” disclosure alone.

The “*objections*” made by the examiner in 08/470,571 were raised because the examiner perceived a continuation, on the part of the applicant, of the same arguments that misled the examiner/Office in the first place. By raising these “*objections*”, the examiner hoped to elicit a response from applicant acknowledging the fact that the instant “1987” disclosure was the only disclosure which could be used to fulfill the requirements of section 112 with respect to the limitations of the currently pending amended claims (the significance of the 1981 disclosure is relegated only to the secondary issue of Section 120 priority). The examiner wanted to be sure that the examiner and applicant were now on the same page concerning this issue. And, on at least one occasion, such an acknowledgment appears to have been provided by applicant [see the last 5 lines on page 141 of the amendment filed on 1/28/2002 in SN 08/470,571].

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2) Applicant does not believe that "common subject matter" is required for "priority" under Section 120. Instead, according to applicant, the only thing that applicant needs to do in order to obtain the earlier 1981 filing date for his pending amended claims is to show that each of his pending amended claims can be given different 1987 and 1981 claim interpretations which allows each claim to be supported, in parallel, by "different subject matter" from the 1981 and 1987 specifications.

"[Section] 120 does not require an applicant to demonstrate that the disclosures relied upon under §120 have anything in common besides their ability to separately comply with §112-1 with respect to the claims for which priority is sought. Accordingly, the Examiner's focus on comparing the support from the two applications for similarity or common subject matter is improper and irrelevant because all applicants are required to do is satisfy §120 is show that each disclosure meets the requirements of §112-1 for a given claim." (emphasis added)

[Page 141 of applicant's response filed on 1/28/2002 in application S.N. 08/470,571]

"Accordingly, the law requires a two part test in which the applicant separately demonstrates § 112 support for each application. In the FOA, the examiner distorts this straightforward test by imposing a third element of the test whereby the § 112 support from each application consists of 'common subject matter.'"

[see the last 10 lines on page 137 of the response filed on 1/28/2002 in SN 08/470,571].

Applicant's position seems to be wrong.

"However, as mentioned earlier, a continuing application is entitled to rely on the earlier filing date of an earlier application only with respect to subject matter common to both applications" (emphasis added)

[In *Transco Products, Inc., v. Performance Contracting, Inc.*, 32 USPQ2d 1077 (**18)]

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“Any claim in a continuation-in-part application that is directed solely to subject matter adequately disclosed under 35 U.S.C. 112 in the parent application is entitled to the filing date of the parent application.”

[In *Transco Products, Inc., v. Performance Contracting, Inc.*, 32 USPQ2d 1077 (**18)]

“Assuming the common inventorship, copendency, and cross-reference required by section 120, that section further requires only that the invention be disclosed in the parent application in such manner as to comply with the first paragraph of section 112 and be the same invention as that disclosed in the later application.” (emphasis added)
[*Kirschner*, 305 F.2d 897 (C.C.PA1962)]

3) In the last 5 lines on page 141 of the response filed on 1/28/2002 in 08/470,571, applicant acknowledged that the 1981 application was not incorporated into the 1987 application. As a consequence, applicant also appears to understand that all Section 112 support must come solely from the “instant” 1987 disclosure if the requirements of section 112 are to be satisfied. If applicant knows such to be true, then it is not understood how applicant can still adopt the following position:

“the [examiner’s] assumption that ‘all limitations of the currently pending claims are necessarily directed to that which is described in the present 1987 disclosure’ is mistaken and wholly unsupported.”¹

[lines 8-10 on page 144 of the amendment filed in 08/470,571 on 1/28/2002].

Namely, if all section 112-1 support for all of the claims’ limitations must

¹ Contrary to applicant’s position, the examiner maintains that a pending claim must necessarily be directed to that which is described in the instant specification. This is not to say that the resulting scope of the pending claim is limited only to that which it must necessarily be directed.

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necessarily come from the instant "1987" disclosure alone (e.g. in light that the disclosure of the 1981 parent was not formally incorporated into the instant 1987 disclosure), then how can a limitation of a claim be directed to (i.e. and obtain required section 112-1 support from) anything but that which is described within the said instant 1987 disclosure? Is applicant suggesting that the pending amended claims are **not** necessarily directed to, do **not** necessarily derive section 112-1 support from, and are **not** necessarily claiming, subject matter that is found in the instant 1987 disclosure?

4) Applicant has alleged that "Teletext decoders" did not "locally generate" the images that they outputted/displayed. According to applicant, Teletext decoders only transferred, to their outputs, displayable image data that was received at their inputs. The examiner rejects such a notion. The following is noted:

a) That, as was exemplified via the discussion provided on page 5 of the appendix that was attached to a 1981 "PETITION FOR RULEMAKING" submitted to the FCC ², it was notoriously well known in the art that transmitted Teletext data *typically* comprised a "series of instructions" which instructed the Teletext decoders on how to "generate" the desired images which were to be outputted/displayed;

b) That conventional Teletext decoders *typically* comprised "character generators"; i.e. such "character generators" would not have been required had the received Teletext data actually comprised displayable image data as alleged by applicant; and

c) That transmitted Teletext data *typically* comprised of ASCII-type codes; i.e. wherein one of ordinary skill in the art would have understood the fact that these ASCII-type codes are not themselves displayable. Specifically, these ASCII-type codes only identified the

² SEE: APPENDIX E and APPENDIX F of the latest Office action in SN 470,571.

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way in which locally stored pixel patterns which were locally retrieved and locally assembled into image frames, e.g. via the "character generators", in order to locally generate the images that were outputted/displayed.

Clearly, Teletext decoders operated to "*locally generate*" the images that they outputted and displayed! ³

5) Applicant's 1987 inventions used a "SPAM" transmission packet structure to transmit ancillary information through the TV broadcast networks. By using the "SPAM" packet structure, a transmission scheme was established in which a piece of coherent "information", e.g. such as a complete "processor instruction", could be broken down into a plurality of "partial information" segments and communicated through the TV network within/as respective "discrete (packet) signals". On the receiver side of the 1987 inventions, the partial information from the plurality of discrete signals could be recovered and re-organized back into the original piece of coherent "information (e.g. re-organized back into the single complete processor instruction).

Applicant has alleged the above described "partial information" transmission scheme is a key feature which distinguishes applicant's alleged 1987 inventions over Teletext "prior art". Applicant's allegation is founded on a huge misunderstanding/misrepresentation of the Teletext "prior art". In fact, via such arguments, it appears that applicant is effectively trying to re-invent the foundation on which the Teletext "prior art"

³ Character data was "always" transmitted in an encoded non-displayable format by "typical" Teletext transmission systems; e.g. the only exception to this "typical" configuration that the examiner is aware of is "typical" Chinese/Japanese ideograph Teletext systems being that there were simply too many Chinese/Japanese characters to encode efficiently. Graphics data, on the other hand, was "typically" encoded such that designated bits of each transmitted graphic code could be mapped by the decoder to regions of the display screen so as to generate the graphics image frame that was to be displayed. Yet, even here, a local graphics generator was still required to convert the graphics codes into displayable pixel data. Such a local graphics generator was conventionally implemented either with dedicated logic circuitry or with a "graphics generator" of the "character generator" variety [SEE: the discussion under the headings "Producing the display" and "Graphics" on page 398 of the article "CEEFAX/ORACLE: reception techniques (part I)" by Money in the 7/1975 issue of "TELEVISION"; and lines 13-21 in column 9 of US Patent #3,982,065].

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was actually built [e.g. see the arguments which begin at the top of page 354 and extend to the bottom of page 356 in the response filed on 1/28/02 in SN 08/470,571].

Specifically, standardized Teletext was based on the recognition that vacant lines occurring during the VBI of TV signal transmissions could be used to transmit/communicate embedded frames/"pages" of character/graphics information along with the TV programming. However, it was instantly recognized that each video line did not have sufficient bandwidth to carry an entire frame/page of the character/graphics data. Therefor, the prior art Teletext systems established Teletext packet structures by which "partial image/information" segments (e.g. such as single "rows" of character and control information) could be communicated via respective discrete packetized signals which were embedded within respective discrete television line intervals. On the receiver side of the Teletext "prior art", the partial information segments from the plurality of discrete packetized signals were recovered and re-organized back into the original frame/pages of character/graphics information in order to "locally generate" a Teletext image for display. But the clear correlation that exists between applicant's "SPAM" transmission scheme and prior art Teletext transmission schemes does not end here!

In addition to the transmission of character/graphic frames/pages, those of ordinary skill in the art quickly recognized that the prior art Teletext transmission schemes could be "extended" so as to carry other kinds of information; e.g. "Telesoftware"(i.e. computer programming), remote control signaling, etc,...

This additional information was carried using the same packetized Teletext structure previously established for the character/graphic image data. For example, Telesoftware was also broken down into "partial information" segments to be carried as "rows" of character-like data within respective Teletext packets of one or more Teletext pages (e.g. depending on the size of the Telesoftware program that was being communicated). On the receiver side, the "partial information" segments of the additional information were then recovered from the transmitted discrete packet signals and were re-organized back into its original form (e.g. the complete "Telesoftware" program was reconstructed from the discrete partial programming segments).

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Given the above, it is still the examiner's position that applicant's 1987 packetized "SPAM" structure represents little more than applicant's own version of a conventional "extended" Teletext system [SEE part "A." under "Section XI" in the Office action mailed 8/27/01 in SN 08/470,571]. And again, for the reasons addressed above, the examiner continues to refute applicant's position that claim recitations directed to "discrete signals" and "partial information" contribute anything to avoiding applied Teletext "prior art"; i.e. applicant's allegations to the contrary represent nothing but "straw men."

6) Applicant points out that term "computer software/programming" has been defined as: "a series of instructions which controls the operation of a computer". Stretching this definition, applicant erroneously suggests that the term "computer software" encompasses: "any series of instructions which controls the operation of a computer". And finally, using this improperly stretched definition, applicant argues that each series of transmitted cuing-type codes which were described in his 1981 parent application *implicitly*⁴ taught the transmission and/or downloading of "computer software" in view that each of these series of codes represented "instructions which controlled the operation of a computer". Applicant's argument is lame. For if one were to accept applicant's argument, then in applicant's new world:

- a) a computer mouse and computer keyboard suddenly become generators of "computer software" because they too generate series of instructions which are used to control the operation of a computer;
- b) Teletext data itself, when received by a CPU implemented decoder, suddenly becomes "computer software" because it too

⁴ Applicant is reminded that what might be "implied" by the 1981 disclosure is irrelevant to section 112-1 support issues. Section 112 support for a claimed feature is only provided if the claimed feature was actually disclosed; i.e. the feature must at least be "inherent" in the disclosure (not simply "implicit").

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represents series of instructions which are used to instruct a computer as to how to generate an image for display;

c) etc,...

Clearly, applicant's argument twists the definition of "computer software" in a way that is repugnant to its conventional use/meaning in order to obtain a 1981 effective filing date for something that he did not have in his possession, and/or did not disclose⁵ until 1987; e.g. namely, the downloading of computer software.

[note: parts "15)" and "16)" of this section too]

7) While applicant has alleged that his "computer software/programming" recitations should be stretched so as to retroactively find support from things which were not "computer software/programming"⁶ (i.e. a series of cuing-type codes/signals from his 1981 disclosure), applicant also takes the opposite approach by alleging that circuit structures which operated to process signals (i.e. specifically Teletext decoders) are not encompassed by the "signal processor" recitations of his pending amended claims.⁷

The examiner disagrees. The examiner points out that not only are Teletext decoders "signal processors" in any conventional sense of such terminology, but that Teletext decoders are in fact "signal processors" specifically within the context of applicant's own alleged invention. More to the point, the Teletext decoders of the applied prior art are like "SPAM" decoders of applicant's alleged inventions in that both decoders operated to extract and process packets of encoded information distributed to them, at least "*preferably*", via the VBI of broadcasted and/or cable casted TV

⁵ In the supplemental response filed 5/06/2002 in 08/470,571, applicant now submits a different version of essentially the same argument [see part "P)" in "SECTION I" of the latest Office action mailed in 08/470,571].

⁶ This erroneous *reading* has been used in order to erroneously allege a 1981 "priority" date for current claim recitations which are directed to the 1987 "computer software/programming" features of the instant 1987 CIP specification.

⁷ This erroneous *reading* has been used to try to distinguish which is now claimed over applied "prior art" of record.

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programming; i.e. wherein the packets of encoded information comprised Teletext data packets in the case of prior art Teletext decoders and comprised SPAM data packets in the case of the SPAM decoders of applicants alleged invention.⁸ Being such, applicant's allegation that conventional Teletext decoders should somehow be excluded by the "signal processor" recitations of his pending claims seems to fall under the heading of: "NONSENSE."⁹

8) The examiner maintains that applicant's own "SPAM" transmission system, at least as described in the context of television distribution, constitutes little more than applicant's own version of an "extended Teletext system"¹⁰. However, when Teletext "prior art" has been applied against applicant's claims, applicant has become hostile to the suggestion that there is any correlation between his "SPAM" transmission system and

⁸ In fact, for reasons which will be addressed in more detail below, the examiner maintains that the "SPAM" data packets of applicant's alleged invention represent, for all intents and purposes, little more than applicant's own version of a Teletext system in which the function of its Teletext data packets have been "extended" so as to carry more than just the normal displayable character/graphics code (e.g. "extended" to carry control signals, Telesoftware, etc,...).

⁹ NOTE:

1) that *typical* Teletext decoders sequentially performed steps of signal slicing/separation, serial-to-parallel conversion, signal storage, ASCII code to pixel data translation, etc... all which were recognized as having comprised steps of "signal processing" [the last 16 lines on page 5 of the appendix that is attached to the "PETITION FOR RULEMAKING" which was filed with the FCC on 3/26/1981 by the "United Kingdom Teletext Industry Group" which explicitly indicates Teletext decoders as having performed "signal processing"]; and

2) that such processing was even true in the unusual "ideograph" decoders of applicant's argument [i.e. see the block labeled "Teletext signal processor" in figure 10 of the NHK article "A Teletext System for Ideographs" by Numaguchi et al.].

¹⁰ The term "extended Teletext" is being used here to refer to Teletext systems which have been "extended" so as to carry other types of information beyond the normal/typical coded Teletext character/graphic information. One alleged novel feature of applicant's SPAM packets was its ability to carry and distribute computer software. However, contrary to applicant's allegation, packets of "extended Teletext" systems had long been used to carry and distribute computer software too. In fact, the term "Telesoftware" had been specifically coined so as to refer to the "software" that was carried by "extended Teletext systems. The point being, that SPAM and Teletext data packets are equivalent right down to there recognized ability to carry other forms of information including "Telesoftware".

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conventional Teletext transmission systems.¹¹ Yet, on the other hand, applicant appears to openly believe that the scope of many of his pending amended claims encompasses the "WEATHER STAR" system/receiver technology which, to the extent understood by the examiner, is in fact a Teletext based technology.¹² If applicant's claimed/disclosed "SPAM" systems/receivers encompass Teletext based systems/receivers such as the "WEATHER STAR" system/receiver technology, then how in the world can applicant possibly suggest that "SPAM" and Teletext are not correlated/analogous technologies/arts with respect to the applied prior art? Clearly there is a conflict between the two positions.

9) Applicant and applicant's originally filed 1987 disclosure both seem to have alleged that "digital television signals/programming", of the type that is recited in many of applicant's pending amended claims, was notoriously well known in the art at the time of his alleged invention. The examiner has challenged applicant's apparent allegations and has requested that applicant submit "prior art" to show such to be true. In response to the examiner's requests, applicant has submitted U.S. Patent #3,906,480 to Schwartz et al. as having evidenced the conventional "digital television signal" technology on which his disclosure and amended claims were/are allegedly based [note the last 11 lines on page 97 and lines 3-6 on page 98 of the amendment filed on 6/7/2000 in SN 08/470,571]. The examiner continues to be mystified by this submission. The examiner points out that the cited Schwartz et al. patent describes a computer display system in which a computer was used to generate, albeit digitally, *frames* of vector encoded graphic/character information which were then transferred, via a data bus, to "digital TV monitors" for display thereon. As far as the examiner can tell, the Schwartz et al. disclosure has absolutely nothing to do with the transmission of "digitized TV signals/programming" in any conventional sense of such terminology. Simply trying to figure out how the Schwartz et al. patent might be related to anything that was originally

¹¹ Yet a large portion, if not the majority, of the "prior art" cited by applicant pertains to Teletext.

¹² SEE: the article "Landmark forms cable weather news network" which is already of record.

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disclosed by applicant in his 1987 disclosure, much less trying to figure out how it could have been used to enable that which was originally disclosed by applicant in his 1987 disclosure, represents an insurmountable invitation to experimentation unto itself. If Schwartz et al. has been cited by applicant out of carelessness, then its submission to the Office for required review and consideration represents nothing less than an unnecessary drain on already limited PTO resources. If, on the other hand, Schwartz et al. was cited out of necessity (e.g. if it actually represents the best showing of his "digital television" recitation that applicant is/was aware of), then its very presence in the record only goes to support the examiner's position that which is now claimed by applicant, i.e. via the subsequently introduced "digital television" recitations, is not supported and/or enabled by applicant's originally filed 1987 disclosure.

10) Applicant has made many attempts to have the Zaboklicki reference [DE 2,914,981] removed from consideration. In many responses [e.g. the communication filed 7/13/2000 in 08/470,571], applicant has argued that the applied Zaboklicki reference should be removed from consideration simply because the teachings and descriptions provided by this applied prior art reference differ from teachings and descriptions provided by other non-applied members of its patent family (namely, GB #2,016,874). Such a position is absurd. If Zaboklicki DE 2,914,981 teaches that which applicant now claimed, then the fact that Zaboklicki GB #2,016,874 might not have provided these same teachings (even if true) is irrelevant to the fact that the claims ARE unpatentable over Zaboklicki DE 2,914,981.¹³

11) Within the originally filed abstract of applicant's 1981 past parent specification (i.e. note S.N. 06/317,510), the term "*programming*" was explicitly defined to mean:

¹³ It is important to note that Zaboklicki [DE 2,914,981] included an extensive "List of References" section which described the operation of the Zaboklicki system element-by-element. This section was absent from Zaboklicki [GB 2,016,874]. This additional description in Zaboklicki [DE 2,914,981] is not trivial in that it goes a long way to understanding the invention which was disclosed in the *applied* Zaboklicki prior art; e.g. namely DE 2,914,981 (not GB 2,016,874).

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“everything transmitted over television or radio intended for communication of entertainment or to instruct or inform”.

[see lines 4-7 in the abstract of US patent #4,694,490]

Today this definition is in conflict with applicant's present needs (e.g. it too refutes applicant's claim to the earlier 1981 priority date ¹⁴). Being such, applicant has argued that this explicitly stated definition should be ignored and given no weight because the “abstract”, as applicant alleges, was not *technically* part of his 1981 written description. The examiner rejects this allegation too. The examiner points out: that the originally filed abstract was certainly part of the originally filed disclosure of applicant's 1981 parent application on which all issues must be considered/based and that the definition of “programming” that was provided by this originally filed abstract is completely consistent with the way that it was used throughout the 1981 disclosure.

12) Applicant seems willing to acknowledge that the “1987 inventions” that are described in the instant 1987 CIP specification are in at least in some ways *enhanced and improved* versions of the 1981 inventions that were described in applicant's past 1981 parent specification.

“In fact, both [the 1981 and 1987] specifications describe the inventions disclosed in the 1981 specification, although the 1987 specification contains many enhancements and improvements.”

[see the last two lines on page 9 of applicant's supplemental response filed 5/6/02 in SN 08/470,571]

¹⁴ The examiner notes that applicant is only entitled to the 1981 priority date for “common subject matter”; i.e. the “same” subject matter that is commonly found in both the present 1987 and the 1981 parent disclosures as originally filed. However, the term “programming” itself does not represent “common subject matter” required for priority because the definition given to it within the present 1987 disclosure is vastly different than the definition given to it via the 1981 parent. Specifically, whenever the “programming” terminology is used in a currently pending claim, section 112-1 demands that it be held to the definition that is explicitly provided via the present 1987 disclosure. This 1987 definition is not entitled to the 1981 priority date in view that the 1981 disclosure explicitly gave the same terminology a different meaning.

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One of the “enhancements and improvements” that was effected via the subsequent filing of instant 1987 CIP specification was a change made to the definition of the word “programming.” Whereas the past 1981 Parent specification defined the terminology as referring to Television and Radio transmissions, the instant 1987 specification “improved and enhanced” the 1981 definition of “programming” to explicitly cover “all forms of electronic transmission” now explicitly including “computer programming”, “broadcast print”, etc,... (e.g. additions to the radio/TV transmission of the past 1981 definition).

“everything that is transmitted over television or radio intended for communication of entertainment or to instruct or inform”;

[“programming” as defined in the past 1981 Parent specification]

“everything that is transmitted electronically to entertain, instruct, or inform including television, radio, broadcast print, computer programming, as well as combined medium programming”.

[“programming” as defined in the instant 1987 CIP specification]

Thus, whereas a potential infringer might have reasonably argued that any claim which derives its required section 112-1 support from the past 1981 specification cannot be fairly read on subject matter outside the Television and Radio transmission arts given the 1981 definition of “programming” (e.g. that these claims cannot be fairly read on computer software/programming transmissions), the wiggle room for such arguments has been effectively eliminated when the identically worded claims derive their required section 112-1 support from the instant 1987 CIP specification instead; i.e. being that the 1987 specification replaces the 1981 definition of “programming” with the new “improved and enhanced” 1987 definition of “programming” which has been expanded to explicitly covers “all forms of

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electronic transmission” including, i.e. explicitly, said “computer programming” transmissions.¹⁵ Thus, the examiner asks:

**Why should any applicant be allowed to improve/enhance/redefine the subject matter that is being recited by a given claim using the new subject matter that was added via a subsequently filed CIP specification, e.g. in order to tighten the noose on existing potential infringers and/or to cast a wider net to ensnare new potential infringers, and yet still be entitled to the earlier filing date of a past un-incorporated 1981 Parent specification that did not contain this improved/enhanced/redefined subject matter?
(The short answer to this question is: NOT!)**

The point being that applicant had every right to draft a claim based on his past 1981 parent specification which contained the 1981 definition of “programming”, and to have taken the position that a fair reading of the 1981 “programming” terminology, e.g. in the context of said past 1981 parent specification, encompassed “computer programming” transmission too; i.e. wherein such an “argument” would have been necessary in view that the 1981 definition of “programming” did not include “computer programming”. Instead, applicant elected to draft a new CIP specification which modified the definition of “programming” to explicitly include “computer programming” thereby eliminating any question that the fair

¹⁵ The examiner maintains that the differences in the respective 1981 and 1987 definitions of “programming”:

1) represent real differences in the respective “properties” of the different kinds of “signaling” that made up the respective 1987 and 1981 subject matter; and

2) are not simply different statements of “disclosed utilities” as applicant might try to allege in the future.

(e.g. once again, the 1987 SPAM-type signaling subject matter that is necessarily being claimed by the pending claims is explicitly inclusive of “computer software/programming” whereas the 1981 signaling subject matter was not).

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reading of "programming", in the context of the new 1987 CIP, now encompasses "computer programming". Again, the examiner asks:

Why should any applicant be allowed to improve/enhance/redefine the subject matter that is being recited by a given claim using new subject matter that was added via a subsequently filed CIP specification, e.g. in order to tighten the noose on existing potential infringers and/or to cast a wider net to ensnare new potential infringers, and still be entitled to the earlier filing date of a past un-incorporated 1981 Parent specification that did not contain this improved/enhanced/redefined subject matter?

(E.G. Why does applicant believe that his new 1987 definition of "programming" should be entitled to the 1981 filing date of the old 1981 "programming" definition which it replaced?; Why should applicant's "1987 inventions", which have been re-defined by the new 1987 definition of "programming", be entitled to the 1981 filing date of "past 1981 inventions" which were defined by the past 1981 definition of "programming?"; etc,...)

13) In order to try to overcome applied prior art of record, applicant has willfully and repeatedly alleged that the Radio and Television broadcast arts represent non-analogous arts. This position is absurd and wholly unsupportable too. The examiner points out that the Television broadcast art actually evolved from the radio broadcast art because the original radio broadcast networks represented existing entities who had the program distribution resources and expertise that was easily extended and applied to TV programming; e.g. NBC, CBS, ABC all began as Radio distribution networks which evolved, quite "naturally", into Television broadcast networks too [NOTE: the last 5 lines of the first paragraph of the first column on page 811 of the article "Versatile Transmission Video Facilities at NBC New York" by Mausler which states that: "the origins of television broadcasting practice may be found in radio" (a copy of which was provided within SN 08/470,571)]. In fact, the most significant difference

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(i.e. if not the only “real” difference) between Radio and Television distribution networks is the difference in bandwidth of the equipment that is required to handle Radio and Television program distributions. Thus, for example, when Hetrich [Australian #74,619] stated that his disclosed “Netcue” system was applicable to either “a network of radio or television stations”, one of ordinary skill in the art would have recognized that this teaching was in fact founded on the underlying understanding that Radio and Television network were in fact analogous arts. Applicant’s allegations to the contrary is based on a unrealistically low level of skill in the art.

14) Throughout the prosecution of their patent portfolio, applicant has alleged that the “***simultaneous or sequential presentation***” recitation, as found in many of their pending claims, represents a “key limitation” in overcoming and/or avoiding “prior art” of record [note: lines 2-6 on page 17 of Appendix A in the response filed on 3/19/2001 in SN 08/469,078; and part “4)” under “Section VII” of the Office action mailed 8/27/01 in SN 08/470,571]. The examiner strongly disagrees. Specifically, the examiner points out that the alternative expressions “*simultaneous or sequential*” or “*one of a simultaneous and sequential*” simply encompasses ANY AND ALL of the ways by which two types of information could ever be presented to a given audience. Specifically, any time two types of information are presented to a given audience, they must necessarily be presented to that audience either *simultaneously or sequentially* in time. The phrase “*simultaneous or sequential*” simply covers ALL of the possibilities! Thus, if one can show that a given piece of “prior art” operated to present two types of information to a given audience, then one has in fact inherently shown that the prior art meets the “*simultaneous or sequential presentation*” limitation of applicant’s claims; i.e. again, the recitation “*simultaneous or sequential*” simply covers ALL of the way that two types of data could ever be displayed to a single audience!

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15) Applicant has alleged that his past 1981 Parent specification “implicitly” taught the downloading of “computer programming” (i.e. computer *software*).¹⁶

“To the contrary, the 1981 definition [of “programming”] implicitly includes, and the 1987 definition [of “programming”] explicitly includes, computer programming in the definition”.

In an attempt to create support for this erroneous allegation, applicant tries to weave together a tapestry of “engineered” teachings and definitions:

- A) Applicant falsely asserts that the past 1981 Parent specification literally used the term “programming” to refer to the “instruction signals” that were communicated through the TV/RADIO networks of its disclosed “1981 inventions”;
- B) Applicant notes that the “instruction signals” of the past 1981 specification were described as comprising signals which instructed *preprogrammed* microcomputers to perform given tasks.
- C) Applicant cites an outside *Dictionary* definition of the term “program” to show that the term “program” was conventionally used to refer to “computer programming/software”; and
- D) Finally, applicant argues that when one combines the above “engineered” teachings from his past 1981 Parent specification together, based on the cited *Dictionary* definition of “program”, one “implicitly” arrives at the cited *Dictionary* definition of “program.”

However, for a variety of reasons, the tapestry which applicant attempts to weave falls apart at the slightest touch:

- A) When one actually looks at the way in which the 1981 “programming” terminology was coined and used throughout applicant’s past 1981 Parent

¹⁶ Again, what might be “implied” by the 1981 disclosure is irrelevant to section 112-1 support issues. Section 112 support for a claimed feature is only provided if the claimed feature was actually disclosed; i.e. the feature must at least be “inherent” in the disclosure (not simply “implicit”).

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specification, i.e. the context in which it actually appears, one finds that the 1981 “programming” terminology unquestionably referred to signaling which represented scheduled TV/Radio shows (and not to “computer software” as applicant now wishfully alleges). In this regard, one finds that applicant’s past 1981 Parent specification distinctly distinguished the 1981 “instruct signals” from the 1981 “programming” into which said 1981 “instruct signals” were embedded. Specifically, the past 1981 parent specification leaves absolutely no doubt that said 1981 “instruct and information signals” constituted ancillary/auxiliary signaling that was “associated” with, and embedded within, respective TV/Radio “programming”:

“One method provides a technique whereby a broadcast or cablecast transmission facility can duplicate the operation of a television studio automatically through the use of instructions and information signals embedded in programming either supplied from a remote source or sources or prerecorded” (emphasis added)

[lines 32-37 of column 3]¹⁷

“Signal processor, 71, has means, described above, to identify and separate the instruction and information signals from their associated programming and pass them, along with information identifying the channel source of each signal, externally to code reader, 72.” (emphasis added)

[lines 3-7 of column 11]

“The cable head end facility contains signal strippers, 81, 85, and 89, of which models exist well known in the art, that controller/computer, 73, can instruct to remove signals from the programming as required, and signal generators, 82, 86, and 90, also known in the art, that controller/computer, 73, can instruct to add signals to programming as required”

[lines 36-42 of column 12]

“One particular advantage of these methods for monitoring programming is that, by locating the identifier signals in the audio

¹⁷ Citations have been obtained from US Patent #4,694,490.

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and/or video and/or other parts of the programing that are conventionally recorded by, for example, conventional video recorders, ...”

[lines 25-29 of column 16]

“Methods for Governing or Influencing the Operation of Equipment that is External to Conventional Television and Radio Sets by Passing Instructions and Information Signal that are Embedded in Television and Radio Programing Transmissions to Such External Equipment” (emphasis added)

[Lines 34-38 of column 17]

“Signal processor apparatus have the ability to identify instruction and information signals in one or more inputted television and radio programing transmissions” (emphasis added)

[lines 39-41 of column 17]

“Microcomputer, 205, is preprogrammed to respond in a predetermined fashion to instruction signals embedded in the “Wall Street Week” programing transmission....These [embedded instruction] signals instruct microcomputer, 205, to generate several video graphic overlays...” (emphasis added)

[lines 42-49 of column 19]

“At this point, an instruction signal is generated in the television studio originating the programming and is transmitted in the programming transmission” (emphasis added)

[lines 60-63 of column 19]

Given the above, it still seems ridiculous for applicant to suggest that the term “programming”, e.g. in the context of the past 1981 specification”, referred to “computer software” (or even that it referred to applicant’s 1981 “instruct and instruction signals”).

B) It is also quite clear from applicant’s 1981 past parent specification that the “microcomputers” on the receiver side of the disclosed 1981 inventions were “*preprogrammed*” with the “computer programming/software” which told then *how to respond* to detected “instruct signals” that were embedded

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within received TV/Radio “programming.” More specifically, it seems quite apparent that each of the 1981 “instruct signals” of applicant’s 1981 inventions represented typical cuing-type signals/commands which instructed/triggered “preprogrammed” microcomputers to execute respective portions of preprogrammed software in order to perform predefined task/operation (e.g. the 1981 “instruct signals” told the 1981 microcomputers “to generate the overlay” whereas the pre-loaded 1981 computer programming/software told said 1981 microcomputers “how to generate the overlay that was to be generated”).¹⁸

“Microcomputer, 205, is preprogrammed to respond in a predetermined fashion to instruction signals embedded in the “Wall Street Week” programing transmission....These [embedded instruction] signals instruct microcomputer, 205, to generate several video graphic overlays...” (emphasis added)

[lines 42-49 of column 19]

Clearly, contrary to applicant’s erroneous allegations, there is no teaching in applicant’s past 1981 specification indicates that applicant’s 1981 “instruct signals” represented “computer software/programming” in any conventional sense of such terminology.

C) The past 1981 parent specification does not offer/provide a signaling mechanism and/or structure which would have been capable of handling the large continuous sequence of data bytes required to push “computer software” through TV and/or Radio networks. Such a signaling mechanism and structure was not provided until “SPAM” packeting was introduced via applicant’s subsequently filed instant 1987 CIP specification. Thus, applicant’s past 1981 parent specification was not enabling of the alleged “computer programming/software” feature (i.e. the alleged “computer programming/software” feature that the past 1981 specification did not even describe/disclose).

¹⁸ This being even more apparent when one reads the teaching of applicant’s past 1981 Parent specification in light of the “enhanced and improved” teachings of applicant’s 1987 CIP specification (i.e. a 1987 specification in which cuing-type signaling was enhanced/improved by the added ability of the 1987 systems to re-program downstream devices via downloaded computer software).

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16) On page 150 of the amendment filed 1/28/2002 in 08/470,571, applicant states:

“The 1981 specification states:

It is the object of this invention to unlock this potential by the development of means and methods which permit programming to communicate with equipment that is external to television receivers and radio receivers, particularly computers and computer peripherals such as printers

1981 Spec., Col. 1, ll.36-41

Thus applicants’ 1981 specification makes it clear that ‘programming’ is not just TV and Radio shows- it can also include instructions, codes, and signals that are communicated to and control e.g., computers and computer peripherals. These instructions, codes, and signals clearly fall within the definition of programming and to find otherwise is to conveniently and purposefully overlook the entire purpose of the invention.” (emphasis added)

The examiner disagrees with applicant’s analysis as to the meaning of the cited excerpt. In reading the 1981 Specification, it seems that “**the entire purpose**”¹⁹ to which applicant alludes was the ability to provide multimedia presentations in which TV or Radio “programming” was be displayed along with another supplemental media presentation; wherein the content of the supplemental media presentation was related to the content TV and Radio “programming” thereby *enhancing* the content of the displayed TV and Radio “programming”. To achieve this goal, ancillary “instruct signals” and/or other ancillary “information signals”

¹⁹ The examiner notes that applicant’s 1981 inventions appear to serve many purposes. Therefor, the examiner does not believe that “the invention” of applicant’s 1981 specification has one “entire purpose” as is now alleged by applicant; i.e. if it does have one “entire purpose”, then it is not clear to the examiner what that “entire purpose” actually is.

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were “associated” with, and “embedded” within, the TV or Radio “programming.” These embedded “instruct and information signals” allowed received TV and Radio *programming* “to communicate” with equipment that was external to the TV and Radio receivers in order to produce the supplemental media presentation. Specifically, the associated “instruct and information signals”, which were embedded within the received Radio or TV “programming”, were themselves transferred to the external equipment thereby causing the external equipment to produce said supplemental media presentations. Being such, it is still crystal clear to the examiner that the 1981 “programming” terminology was used in a conventional sense by the 1981 specification so as to refer to TV and Radio signaling which represented scheduled TV and Radio shows. To suggest otherwise is to conveniently and purposefully ignore the fact that applicant’s 1981 specification clearly distinguished the associated “instruct and information signals” as being separate/distinct entities with respect to the “programming” (i.e. the radio/TV shows) into which these associated “instruct and information signals” were embedded:

“One method provides a technique whereby a broadcast or cablecast transmission facility can duplicate the operation of a television studio automatically through the use of **instructions and information signals embedded in programing** either supplied from a remote source or sources or prerecorded” (emphasis added)
[lines 32-37 of column 3]²⁰

“Signal processor, 71, has means, described above, to **identify and separate the instruction and information signals from their associated programing** and pass them, along with information identifying the channel source of each signal, externally to code reader, 72.” (emphasis added)
[lines 3-7 of column 11]

“The cable head end facility contains signal strippers, 81, 85, and 89, of which models exist well known in the art, that controller/computer, 73, can instruct to **remove signals from the programing** as required, and signal generators, 82, 86, and 90, also known in the art, that controller/computer, 73, can instruct to **add signals to programing as required**” (emphasis added)
[lines 36-42 of column 12]

“One particular advantage of these methods for monitoring programming is that, by locating the **identifier signals in the audio and/or video and/or other parts of the programing** that are conventionally recorded by, for example, conventional video recorders, ...” (emphasis added)
[lines 25-29 of column 16]

“Methods for Governing or Influencing the Operation of Equipment that is External to Conventional Television and Radio Sets by **Passing Instructions and Information Signal that are Embedded in**

²⁰ Citations have been obtained from US Patent #4,694,490.

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Television and Radio Programing Transmissions to Such External Equipment” (emphasis added)
[Lines 34-38 of column 17]

“Signal processor apparatus have the ability to identify instruction and information signals in one or more inputted television and radio programing transmissions” (emphasis added)
[lines 39-41 of column 17]

“Microcomputer, 205, is preprogrammed to respond in a predetermined fashion to instruction signals embedded in the “Wall Street Week” programing transmission....These [embedded instruction] signals instruct microcomputer, 205, to generate several video graphic overlays...” (emphasis added)
[lines 42-49 of column 19]

“At this point, an instruction signal is generated in the television studio originating the programming and is transmitted in the programming transmission” (emphasis added)
[lines 60-63 of column 19]

17) Applicant clearly failed to carry his original 1981 disclosure forward into the instant 1987 disclosure ²¹. Because of this, applicant has forfeited his right to now claim any subject matter that was set forth in the disclosure of his originally filed 1981 parent application, but was not carried forward into the disclosure of his originally filed 1987 parent application ²². Thus, APPLICANT IS CLEARLY WRONG when he alleges that he can secure a 1981 priority date for that which is now claimed by showing “possession” of that which is now claimed via the original disclosure of his 1981 parent application (i.e. NOT for the subject matter that was left behind!). Specifically, not only must applicant show that he possessed the subject

²¹ The examiner notes that applicant failed to incorporate the original disclosure from his 1981 parent application into the original disclosure of his 1987 parent; i.e. the 1981 disclosure was neither formally copied into the 1987 disclosure nor was the 1981 disclosure “incorporated by reference” into the 1987 disclosure. The original 1987 disclosure simply replaced the 1981 disclosure as “THE INSTANT DISCLOSURE” from which all section 112 issues must be analyzed.

²² As evidenced by testimony given in ITC investigation #337-TA-392, even applicant and/or his counsel seemed unsure as to exactly what subject matter from applicant’s 1981 parent (“if any”) made it into applicant’s 1987 disclosure.

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matter that is now claimed with respect to the original 1981 disclosure but, more importantly²³, applicant must first show possession of the same claimed subject matter with respect to the instant 1987 disclosure. Stated another way, to secure priority, applicant must be able to show that he did not forfeit his right to claim the subject matter possessed in his originally filed 1981 parent application by showing, *independently*²⁴, that he possessed this same subject matter via the originally filed disclosure of his present application too (i.e. with 1987 disclosure).

18) Applicant is only entitled to claim subject matter which was set forth within the originally filed 1987 disclosure of his present application in accordance with ALL of the requirements of section 112-1. Specifically, the examiner refutes applicant's allegations that the original disclosure of his 1981 parent application can be used in place of the instant 1987 disclosure to meet one or more of the section 112-1 requirements (namely, to establish "possession" of that which is now claimed). It is only after proper section 112 support (i.e. including "possession") has first been established for the pending claims from the disclosure of the present application (the 1987 disclosure), that there is even a need to consider applicant's 1981 parent application at all. Simply put, if the pending claims are not supported under section 112-1 by applicant's present disclosure as originally filed, then the pending claims themselves fail to comply with the

²³ "More important" in the sense that applicant is prohibited from now claiming anything that is not fully supported in accordance with all of the requirements of section 112-1 by the present disclosure (e.g. the disclosure that was originally filed by applicant in 1987). Specifically, the present claims fall under section 112-1 if they are not fully supported by the present 1987 disclosure even if they were, by some remote chance, fully supported by the disclosure of the earlier 1981 parent.

²⁴ If applicant had formally/properly incorporated the written description from his 1981 parent application into his originally filed 1987 disclosure, then there would be no need for these "independent" showings; i.e. applicant could have established "possession" via the originally filed disclosure of his 1981 application alone. It is only because applicant failed to formally/properly incorporate the written description from his 1981 parent into his originally filed 1987 disclosure, that such "independent" showings of "possession" are needed; i.e. because the actions taken by applicant have in fact caused the forfeiture of his right to now claim that subject matter from his 1981 disclosure which was not carried forward into the 1987 application.

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requirements of section 112-1 and no further questions need be asked ²⁵. Again, because applicant failed to formally/properly incorporate his 1981 disclosure into his 1987 disclosure, applicant is prohibited from relying on his 1981 disclosure to supplement his present 1987 disclosure (i.e. at least as far as complying with the requirements of section 112-1 is concerned). Stated another way, because applicant's 1981 parent application was never formally incorporated into applicant's present 1987 disclosure, it does not constitute part of applicant's 1987 disclosure, i.e. the *instant disclosure*, from which all section 112-1 support for the currently pending amended claims must be derived.

19) As was noted above, applicant does not believe that "common subject matter" is a requirement for priority under section 120.

***"[Section] 120 does not require an applicant to demonstrate that the disclosures relied upon under §120 have anything in common besides their ability to separately comply with §112-1 with respect to the claims for which priority is sought. Accordingly, the Examiner's focus on comparing the support from the two applications for similarity or common subject matter is improper and irrelevant because all applicants are required to do is satisfy §120 is show that each disclosure meets the requirements of §112-1 for a given claim."* (emphasis added)**

[Page 141 of applicant's response filed on 1/28/2002 in application S.N. 08/470,571]

"Accordingly, the law requires a two part test in which the applicant separately demonstrates § 112 support for each application. In the FOA, the examiner distorts this straightforward test by imposing a third element of the test whereby the § 112 support from each application consists of 'common subject matter.'"

[see the last 10 lines on page 137 of the response filed on 1/28/2002 in SN 08/470,571].

²⁵ At least with respect to the issue of "adequate written description".

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Being such, applicant does not even pretend that the subject matter that is now being claimed in his many applications represents "common subject matter" between the instant 1987 CIP specification and the past 1981 parent specification. Instead, applicant is happy to allege the benefit of section 120 priority for that which is claimed based only on alleged "correlated subject matter" between his 1987 and 1981 specifications; e.g. NOTE:

- a) That Appendix C of applicant's response filed 6/7/2000 sets forth alleged "correlations" between respective 1981 and 1987 disclosures; and
- b) That the claim by claim showing of alleged 1981 and 1987 section 112 claim support in Appendix A of applicant's response filed 6/7/2000 seem to regurgitate many of the alleged "correlations".

The examiner, on the other hand, believes that "common subject matter" is in fact a requirement of section 120. Thus, the examiner maintains that applicant's allegations pertaining to the existence of "correlated subject matter" are irrelevant to the issue of section 120 priority because "common subject matter", not "correlated subject matter", is required under section 120.²⁶

An extreme example of just how far applicant has been willing to distort section 120 in an effort to obtain the 1981 priority date for ones of the pending amended claims can be found in the claim chart for claim 123 within APPENDIX A of applicant's response filed 6/7/2000 in SN 08/470,571. In this claim chart, applicant alleges that the recitations of claim 123 find section 112-1 support via the "Super Discount Supermarkets" embodiment of the instant 1987 disclosure while alleging that this claimed 1987 "Super Discount Supermarkets" embodiment is entitled to the 1981 filing date of the parent application based on the 1981 "Wall Street Week" embodiment. The examiner disagrees. Specifically, the examiner maintains that the 1987 "Super Discount Supermarkets" embodiment and the 1981 "Wall Street Week" embodiment do not

²⁶ See part "A)" of "SECTION I" above

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constitute "common subject matter" and therefore the claimed 1987 "Super Discount Supermarkets" embodiment is not entitled to the 1981 filing date of the 1981 "Wall Street Week" embodiment as alleged.

20) In lines 3-7 on page 11 of the supplemental response filed 5/06/2002 in SN 08/470,571, applicant states:

"the starting point for determining whether an applicant is entitled to priority under section 120 is what is being claimed. Without identifying precisely what is being claimed, it is impossible to seriously undertake an analysis of whether sufficient support exists in both applications thus entitling applicants to a 1981 priority date". ²⁷

The examiner was a bit surprised that applicant raised this issue after all of the section 112-1 requests which have been made by the Office throughout the present prosecution in hopes of getting applicant's clarification as to *precisely what it is* that applicant claims. In fact, the Office continues to struggle in its efforts to make such determinations for the 10,000 or so pending amended claims. In the past, when applicant has been asked to identify "*precisely what is being claimed*", applicant has declined ²⁸ to provide such showings instead opting to take the positions:

A) That it is the examiner's job, not applicant's, to read and understand the 557 pages of applicant's current 1987 CIP specification in order to determine "precisely what it is being claimed" via applicant's 10,000 or so pending claims; and

²⁷ The examiner agrees with applicant's position noting that, without being able to identify precisely what it is that is being claimed, it is impossible to seriously undertake many other examining related activities too.

²⁸ A notable exception being the most helpful claim charts of alleged "dual" section 112 support which applicant has, only on a few occasions, been willing to kindly provide [e.g. APPENDIX A in the amendment filed 6/7/2000 in 08/470,571].

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B) That at least some of the limitations of applicant's 10,000 or so pending claims are actually directed to subject matter that is not described within in the instant 1987 CIP specification.

“the [examiner’s] assumption that ‘all limitations of the currently pending claims are necessarily directed to that which is described in the present 1987 disclosure’ is mistaken and wholly unsupported.”²⁹

[lines 8-10 on page 144 of the amendment filed in 08/470,571 on 1/28/2002].

Hence applicant does not wish to cite, or indeed is unable to cite, section 112-1 support from the instant CIP disclosure for these limitations [e.g. often times out of an expressed fear that a court, at some later date, might actually hold the scope/meaning of these limitations as being directed to subject matter that was actually disclosed within the instant 1987 CIP specification].

In regard to the section 112-1 issue that has now been raised by applicant, the following positions continue to be taken by the present examiner:

A) It has always been a desire of the Office to determine “precisely what it is” that applicant now claims. Being that it still remains so unclear as to “precisely what it is” that applicant now claims, clarification on the part of applicant is once again formally requested for the 10,000 or so pending claims. For the record, the current examiner has found applicant's claim charts of alleged “dual” section 112-1 support to be the most helpful form of aid that applicant has provided to date because it at least attempts to match each claimed

²⁹ Contrary to applicant's position, the examiner maintains that a pending claim must necessarily be directed to that which is described in the instant 1987 specification. This is not to say that the resulting scope of the pending claim is limited only to that of the 1987 specification to which it must necessarily be directed.

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limitation to the specific teachings in the specification(s) that they are allegedly directed;³⁰ and

B) The examiner continues to adopt the positions expressed by Judge Luckern at the ITC:

1) “that the specification of the ‘277 patent [the 557 pages of the instant 1987 specification] is difficult to understand, as it is dealing with many possible systems”;

2) “that despite complainant’s [i.e. the current applicant’s] attempts to point to the specification of the ‘277 patent [the 557 pages of the instant 1987 specification] as illustrative of some claim elements, said specification has not been helpful in connecting individual claim language to distinct statements in the specification of the ‘277 patent that is supposed to provide an explanation of the claimed systems in issue”;

3) “that complainant’s [i.e. the current applicant’s] assertions in many instances of where support in the specification of the ‘277 patent [the 557 pages of the instant 1987 specification] can be found for claimed elements ‘reads like the directions to a treasure hunt. There’s a piece here, there’s a piece there, it’s in there somewhere.’”; and

4) “ that the specification of the ‘277 patent [the 557 pages of the instant 1987 specification] and the claims in issue

³⁰ The process of showing a limitation-to-disclosure match for each limitation of each claim should be an easy task for applicant, if not a trivial one, being that the currently pending claims must be “*clearly anticipated*” by the teachings of applicant’s instant disclosure.

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'are like ships passing in the night in the same ocean, but not necessarily sailing in the same direction.'"
[SEE: 1997 ITC Lexis 307, *258 (part I of II)]

Once again, the examiner hereby requests applicant's help in determining "precisely what it is" that applicant now claims.

21) The examiner notes that the "SPAM" technology, on which the "more sophisticated" systems of applicant's present 1987 disclosure are based, is vastly different from the "cuing-type signal" technology on which the "primitive" systems of applicant's 1981 parent application were based; e.g. the ability of SPAM to carry and distribute "software" being but just one of the more notable differences. Clearly, the "more sophisticated" 1987 alleged inventions that are now *necessarily being claimed* are not entitled to the 1981 filing date of their 1981 "primitive" ancestors; i.e. applicant is not allowed to transport his "more sophisticated" 1987 alleged inventions back in time to the 1981 filing date of his different, albeit sometimes "correlated", "primitive" 1981 alleged inventions.

22) The issues cited above illustrate a further dilemma that the examiners have faced when trying to read and understand that which is now being claimed by applicant. Specifically, terminology which might seem definite when one looks to the instant 1987 disclosure alone, becomes confusing and indefinite when read in light of applicant's responses; responses in which applicant has applied newer 1987 interpretations/definitions to the claims in order to establish section 112-1 support and has applied older and different 1981 interpretations/definitions to the same claims in order to obtain the 1981 priority date for the recitations (this approach is evident throughout appendix A of applicant's last response). Thus, at times, it seems to be the record itself that has, or that has at least contributed to, making the meaning and scope of the claims' recitations so unclear. It must also be noted that the claim recitations themselves are often contorted in the attempt to craft them to read independently on different

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teachings from the two disclosures³¹. Not only does this process results in claim limitations that are difficult to read in that they do not quite fit teachings from either disclosure, but more importantly, the effort involved in this process is wasted effort because the subject matter being claimed/referenced in the two disclosures is not “common subject matter”; e.g. the claims are not entitled to the 1981 filing date even if it could be shown that they can be read on respective (but different) subject matter from the two disclosure (a situation that is also quite evident from appendix A of applicant’s last response).

Even so, given a record in which applicant continues to argue that his pending claims are entitled to the 1981 priority date because they can be read in different ways on the 1981 and 1987 disclosures, a situation is created in which the “broadest reasonable meaning” of a claim’s limitations takes on one meaning when defined by the file history itself (e.g. when based on applicant’s attempt to read each claims’ limitations, improperly, onto two completely different disclosures), and takes on a different meaning when defined, properly, from the originally filed 1987 disclosure by itself. Should the examiner apply the “prior art” according to the interpretations afforded by applicant’s 1987 disclosure alone (as is proper), or should the examiner apply the “prior art” according to the interpretations created by applicant via his improper reliance on different subject matter from the different 1981 and 1987 specifications? No matter how you cut it, the result is confusion!

³¹ For example, applicant’s claims now recite “downloadable processor instructions” which has no antecedent basis in either of the originally filed 1987 and 1981 disclosures. Yet it appears that this recitation could, quite properly, be read on the originally described “program instruction sets” (e.g. downloaded software) of applicant’s instant 1987 disclosure. However, when one looks at appendix A of applicant’s last response, one finds that applicant has attempted to read the recitation not on the originally described “program instruction sets” of the instant disclosure, but instead on respective (and different) commands/instructions from the 1981 and 1987 disclosures both of which functioned only to trigger actions/operations on the receiver side. Applicant resorts to this interpretation apparently out of recognition that the “program instruction sets”/software of the instant 1987 disclosure has no equivalent in the 1981 disclosure. What results from this process is a claim which looks like it is literally directed to the downloading of software that was described only in the 1987 disclosure, and yet has been afforded the 1981 effective filing of a parent application in which such a feature was not disclosed (i.e. effectively transporting the 1987 “downloading of software” feature back in time to the 1981 date of the parent application in which it was not disclosed).

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23) The following position taken by Judge Rich demonstrates that “continuity of disclosure”, needed to establish the benefit of priority under section 120, requires continuity of “common subject matter” in a form that meets all of the requirements of section 112-1; e.g. even continuity of “best mode”.

“It must be understood that the introduction of a new best mode disclosure would constitute the injection of ‘new matter’ into the application and automatically deprive the applicant of the benefit of the earlier filing date of the parent or original application for any claim whose validity rests on the new best mode disclosure”.

TRANSCO [38 F.3d 551; 32 U.S.P.Q.2D (BNA) 1077]

24) At times, applicant seems to be of the opinion that *only* the “enablement” requirement of section 112-1 applies to the issue of “continuity”. At other times, applicant seems to be of the opinion that *only* the “description” requirement of section 112-1 applies to the issue of “continuity”. On its face, one of these two positions must be wrong (i.e. they are mutually exclusive). In reality, both positions are wrong. As evidenced above, *ALL* of the requirements under section 112-1 apply to the issue of “continuity” (e.g. even “best mode”). Being such, applicant is only entitled to the benefit of an earlier filing date for claims that are directed to “common subject matter” for which “continuity” has been maintained between the present and the earlier filed application. “Continuity of common subject matter” exists between applications only when there is:

A) Continuity of “written description” between applications for the subject matter being claimed (as defined under section 112-1);

B) Continuity of “enablement” between applications for the subject matter being claimed (as defined under section 112-1); *and*

C) Continuity of “best mode” between applications for the subject matter being claimed (as defined under section 112-1).

[note sections 14 and 15 above]

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Being such, none of applicant's currently pending amended claims are entitled to the priority date of applicant's 1981 parent application in that the claims are not directed to "subject matter"³² for which there is has been:

- a) the required continuity of "written description" between applications;
- b) the required continuity of "enablement" between applications;
and
- c) the required continuity of "best mode" between applications.³³

25) It is understood that CIP practice allows an applicant to file a new application containing additional/new subject matter while preserving the applicant's right to claim (and the right to the earlier filing date for) subject

³² The "subject matter" currently being claimed corresponds to the metes and bounds of the pending amended claims as defined by the instant 1987 CIP specification from which they depend. Obviously, for reasons that have been addressed throughout the record, this 1987 "subject matter" currently being claimed is different from the 1981 "subject matter" which would have been claimed had the metes and bound of these same claims been defined by the past 1981 parent specification instead; i.e. evidencing the lack of continuity in "common subject matter" with respect to that which is claimed.

³³ e.g. applicant has argued that he was under no obligation to update his earlier filed disclosure with his "new best mode" when originally filed the present disclosure. The examiner strongly agrees. However, to maintains continuity between applications, applicant was required to at least carry forward the "old best mode" from of his earlier filed application into his originally filed present disclosure. Applicant failed to do this and therefor has not maintained "continuity of disclosure". For example, as was noted in part "13" of this paragraph, the "old best mode" of applicant's 1981 parent application was based exclusively on primitive 1981 cuing technology while the "new best mode" of applicant's present application was based exclusively on the more sophisticated 1987 "SPAM" technology (i.e. extended Teletext technology). In view that the primitive 1981 cuing technology was not carried forward into the present 1987 application, e.g. applicant's new 1987 disclosure literally replaced applicant's earlier filed 1981 disclosure in its entirety, the "old best mode" was in fact left behind (i.e. it had to be!). For this reason alone, the pending amended claims are not entitled to the 1981 priority date of applicant's parent application. Again, the pending amended claims are necessarily directed to the systems/methods of applicant's present 1987 disclosure which is based on the more sophisticated "SPAM" technology". Accepting applicant's claim to a 1981 priority date for these pending amended claims would allow applicant to transport claims which are necessarily directed to the 1987 disclosure/technology back in time to the 1981 date of the earlier disclosure/technology. Using this scheme, applicant would be able to improperly transport his new 1987 "best mode"/technology back in time to the 1981 date of his "old best mode"/technology.

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matter which was previously disclosed in the parent application. But an applicant's right to claim subject matter from the parent application is only preserved for that subject matter of the parent application which has actually been carried forward (e.g. *incorporated*) into the disclosure of the CIP. Any and all subject matter from the parent application that is not carried forward into the disclosure of the CIP cannot be legally claimed within said CIP; i.e. the right to claim subject matter that is left behind is lost/forfeited with respect to said CIP application. To prevent such a loss/forfeiture, it is common for an applicant to draft the disclosure of his CIP application so that it literally incorporates the entire disclosure of the parent application, e.g. either physically or "by reference", thereby literally carrying forward all of the subject matter from the parent application into the CIP application and in doing so:

A) Preserving applicant's right to claim any/all of the subject matter from the parent within said CIP application; and

B) Preserving applicant's right to the filing date of the parent application for any/all claims which are directed to the subject matter of the parent application that has been carried forward into the CIP application.

In contrast to the common CIP practice described above, when filing his 1987 CIP disclosure, the present applicant elected to draft an entirely new specification and elected not to formally incorporate the disclosure from his 1981 parent application in its entirety. In fact, when filing his 1987 CIP disclosure, applicant elected to draft the entirely new specification in a way which makes it difficult to impossible to determine if any of the subject matter from his 1981 parent was carried forward into the disclosure of his CIP³⁴. Today, faced with the fact that subject matter which was not carried forward (i.e. *incorporated*) into the present disclosure has been lost/forfeited, applicant takes a leap of faith by suggesting that all of the subject matter from his 1981 parent application somehow/miraculously found its way into the new disclosure of his 1987 CIP. Clearly, this is not

³⁴ For example: the 1987 CIP appears to have injected a "new best mode disclosure" by literally replacing the 1981 inventions with new 1987 inventions which, by itself, refutes all claims of priority to the 1981 filing date.

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true. In fact, when one studies the two disclosures in detail, one actually finds that little to none of the subject matter from the 1981 parent made it into the 1987 CIP disclosure in a form that constitutes "common subject matter". For example, even the subject matter from the two disclosures which looks similar at first glance, is based on vastly different transmission technologies, different scopes/meaning/interpretations, and on a new "best mode" [e.g. note Appendix II of the Office action mailed 8/27/01 in SN 08/470,571]. Being such, it does not appear that any of applicant's currently pending amended claims are entitled to the 1981 date of applicant's parent application.

26) In the past, applicant seems to have suggested that even if one were to find that applicant's 1981 disclosure had not been carried forward into applicant's later filed 1987 disclosure, one/applicant could still rely on said 1981 disclosure to provide an understanding of the later filed 1987 disclosure with respect to issues under section 112. The examiner notes that only "prior art" can be used for such purposes. Therefor applicant's 1981 can only be used to clarify/supplement his 1987 disclosure if it is found to be "prior art" with respect to the 1987 disclosure. But if the 1981 disclosure is "prior art" for applicant's suggested purpose (i.e. for the purpose of understanding the later filed 1987 disclosure), then it must be "prior art" for issues under sections 102 and 103 too. Thus, for applicant to suggest that his 1981 disclosure be used as "prior art" for the purpose of understanding his 1987 disclosure seems to put applicant, at least potentially, on a very slippery slope; i.e. because if applicant's position were ever *legally* accepted, then applicant's 1981 disclosure would *legally* become "prior art" against the 1987 disclosure for sections 102 and 103 issues too.³⁵

³⁵ For the record: applicant's 1981 disclosure does not constitute "prior art" with respect to applicant's 1987 disclosure and therefor cannot serve as "prior art" for any purposes. Thus, applicant's 1981 disclosure cannot be used to supplement ones understanding of applicant's 1987 disclosure, with respect to issues under section 112-1, as seems to have been improperly suggested by applicant in the past. Specifically, with respect to section 112 issues, applicant's 1987 disclosure *stands alone*.

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27) The examiner notes that many of applicant's pending claims recite the following receiving station structures: a) a receiver; b) a signal detector; c) a processor; and d) an output device. Appendix A of the response filed on 6/7/2000 in SN 08/470,571 shows that:

- a) the recited "receiver" refers to nothing more than --a TV tuner--;
- b) the recited "signal detector" refers to nothing more than a decoder 203 which extracts and error corrects embedded information from the VBI of TV programming;
- c) the recited "processor" refers to nothing more than microcomputer 205; and
- d) the recited "output device" refers to nothing more than a "TV monitor".

The examiner maintains that all of these recited structures are found within a conventional CPU/MP/computer implemented Teletext receivers. For example, note:

- a) the TV tuning element (2);
- b) the extracting and decoding circuitry 8 and 11;
- c) the processing element (13); and
- d) the TV monitor/display (6),
of BETTS [GB 1,556,366].

Such further highlights the direct correlations that exists between the "SPAM" distribution system of applicant's alleged invention and the "Teletext" distribution systems of the "prior art". Again, the examiner believes that applicant's "SPAM" is, for all intents and purposes, synonymous with conventional "Extended Teletext" [note part "5" of this section];

28) Applicant's originally filed instant disclosure clearly taught away from the "interactive" ultimate receiver station configuration which has been claimed during the present prosecution [note claim 56 as presented in the amendment filed 6/7/2000 and 7/13/2000 in 08/470,571]. Namely, as originally described, one of the key advantages that was allegedly offered by applicant's alleged inventions was the fact that the "ultimate receiver stations" produced their respective personalized audio/video presentation "automatically" and without any manual input from the viewer; e.g. whereby

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the complex processing that was involved within the system remained hidden from, and transparent to, the viewer/user; SEE:

A) lines 27-34 on page 11 of applicant's instant disclosure as originally filed;

B) lines 18-20 on page 91 of applicant's instant disclosure as originally filed;

C) lines 13-34 on page 427 of applicant's instant disclosure as originally filed;

D) etc,...

Despite this original teaching, applicant has subsequently attempted to introduce pending amended claims into the record which, according to applicant's own allegation (see the support for claim 56 as was set forth in APPENDIX A of the amendment filed on 6/7/2000 in SN 08/470,571), recite an "interactive" implementation of the originally disclosed non-interactive "ultimate receiver stations". The section 112-1 problem is immediately apparent [also note the arguments set forth in latest Office action of SN 08/470,571].

29) As originally described, it appears that the "ultimate receiver stations" of applicant's alleged invention produced the combined image of applicant's figure 1C by (apparently) additively mixing the images of figures 1A and 1B in their entirety; i.e. this fact seems to explain why the "line" of figure 1A had to be produced "on a background color that is transparent when overlaid on a separate video image" as was described in applicant's originally filed disclosure [see lines 9-14 on page 25 of applicant's instant disclosure]. Despite this original teaching, applicant now attempts to introduce claims which recite a process in which the respective images are now combined in less than their entirety and/or in which one portion of one image is "replaced" by a portion of another. The section 112-1 problem is immediately apparent [note the latest Office action in SN 08/470,571].

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30) In the first two lines under the heading “a. *Independent Claim 56 and Dependent Claims Thereto*” on page 287 of the response filed 1/28/2002 in SN 08/470,571, applicant alleges that the publication date of the applied Gunn et al article was never established by the Office. This allegation is untrue. The following is noted:

a) This Gunn et al. article was originally submitted by applicant for consideration within voluminous IDS citations. However, as with many of these citations, applicant never provided the Office with information regarding the publication date of the article;

b) The Gunn et al. article has been applied by the Office against many of applicant's pending claims, and while applicant never provided the Office with the article's publication date, the Office was able to establish the date in question and notified applicant of it accordingly [note: the PTO- 892 of paper #2 in the present 08/470,571 record; the PTO-892 of paper #20 in SN 08/447,502; etc,...];

c) Again, the publication date for this Gunn et al. article, e.g. an article that was submitted by applicant for consideration against the pending amended claims, is March 26-28 of 1980. This date is, by any standard, valid “prior art” against all of applicant's pending claims.

31) etc,...

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SECTION II: (112-2 REJECTIONS)

A) Claims 5-34 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

1) The examiner notes that “alternative-type” recitations continue to be injected throughout the pending amended claims. Each occurrence of each alternative recitation implicitly imparts various different interpretations onto each limitation into which such “alternative-type” recitations are injected. The number of different imparted interpretations results in confusion as more and more alternative limitations are grouped together to form a pending claim. This is particularly true when the claims derive section 112 alleged support from a very large written description which by all accounts is itself difficult to read and digest. Additionally, the examiner notes that such alternative recitations are not “generic” recitations in that they literally recite each of the alternatives as alternatives; e.g. as opposed to simply being broad enough to generically encompass all the alternatives. Being such, the examiner maintains that there must be section 112-1 support in the originally filed written description for each of the recited alternatives if the claims are to pass section 112 muster [an issue which will be raised in the following section of this Office action]. For example, it would be improper for an applicant to draft a claim directed to “a toy that is powered by one or more of D or C or AA cell batteries” based on an originally filed disclosure that only described “a toy that was powered by one D cell battery”; i.e. the fact that one of the recited alternatives finds section 112-1 support does not mean that the other non-supported recited alternatives can simply be ignored/excused. To the contrary, there must be section 112 support for each and all of the recited alternatives [for the plural D, C, and AA permutations too].

Confusion cause by the use of such alternative expressions clearly increases as more and more alternative limitations are added to form a claim; i.e. as the number of recited permutations skyrockets. While applicant is certainly entitled to draft his claims using alternative expressions, there are constraints to the practice:

- 1) Under the requirements of Section 112-2, each claim must be drafted in a manner that defines the alleged invention in a clear and concise manner. The fulfillment of this requirement is clearly jeopardized by an excessive use of alternative language/phrases.
- 2) Under the requirements of Section 112-1, support must be provided in the originally filed disclosure for that which is being claimed and therefor support must be shown/provided for each and every permutation that is set forth by such alternative recitations (i.e. there must be section 112-1 support for the alternative expression itself); and
- 3) Whereas section 112-1 support from applicant’s originally filed disclosure must be provided for each permutation, “prior art” that is applied against the claims under section 102 and 103 needs only show or suggest one of the recited permutation in order to properly reject the claims.

2) In claim 5, line 12, the phrase “reprocessing information received in said information transmission” is confusing because it suggest a prior step in which this received information had been processed. Yet no earlier step of processing this information has even been recited. Thus it is unclear as to what “reprocessing”, e.g. in the context of the recited method, refers. Clarification is needed.

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- 3) In line 2 of claim 10, "at least some an address" appears to be incorrect; i.e. it is not clear what it means or to what it refers. Clarification is needed.
- 4) It appears that claim 13 should depend from claim 12 and not claim 5 as is now recited due to lack of antecedent basis for the recitation in claim 5.
- 5) In line 2 of claim 16, it is not clear what is meant by "performing forward error correction information." Should the term "information" be deleted? Should --on-- be inserted before "information?" Or is some other corrective action needed?
- 6) In claim 23, line 5, it appears that "instruction" should read --instructions-- in order to provide proper antecedent basis for later recitations.
- 7) In claim 23, lines 9 and 10, "said information transmission containing said program and said processor instruction" has no antecedent basis and is indefinite because is not clear to what it refers; e.g. being that only the received "information transmission containing only a portion of the processor instruction and the program" has been previously recited.
- 8) In claim 23, lines 13 and 14, it is not clear if "said information transmission" refers back to the one which was received in line 4 or to the one which was transmitted in line 9, or to some other form of the transmission. Similar clarification is needed for "said information transmission" of lines 15 and 16.
- 9) In claim 23, lines 15 and 16, the phrase "received in said information transmission" is confusing and indefinite because it actually appears to refer to a receiving step which has never been recited in the claim; i.e. to a step of receiving that occurs at the receiving station. Clarification is needed.
- 10) The examiner notes that a method claim must positively set forth the steps which comprise the recited method. Being such, the recitation of claim 24 are confusing and indefinite because the recite "effects" of lines 6-11 and the recited "effects" of lines 12-17 implicitly set forth steps without positively reciting them. Thus, it is not clear whether such implied steps are actually part of, and therefor required by, the method that is actually being recited. Clarification is needed.
- 11) Similar clarifications are needed throughout the claims.

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SECTION III: (112-1 REJECTIONS)

A) Claims 5-34 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

In related ITC investigation No. 337-TA-392, the Administrative Law Judge found:

1) “that the specification of the ‘277 patent [the 557 pages of the instant 1987 disclosure] is difficult to understand, as it is dealing with many possible systems”;

2) “that despite complainant’s [the current applicant’s] attempts to point to the specification of the ‘277 patent [the 557 pages of the instant 1987 disclosure] as illustrative of some claim elements, said specification has not been helpful in connecting individual claim language to distinct statements in the specification of the ‘277 patent that is supposed to provide an explanation of the claimed systems in issue”;

3) “that complainant’s [the current applicant’s] assertions in many instances of where support in the specification of the ‘277 patent [the 557 pages of the instant 1987 disclosure] can be found for claimed elements ‘reads like the directions to a treasure hunt. There’s a piece here, there’s a piece there, it’s in there somewhere.”; and

4) “ that the specification of the ‘277 patent [the 557 pages of the instant 1987 disclosure] and the claims in issue ‘are like ships passing in the night in the same ocean, but not necessarily sailing in the same direction.”

[SEE: 1997 ITC Lexis 307, *258 (part I of II)]

The examiner continues to adopt these same positions in regard to the pending amended claims currently at issue. The following represent specific examples of such section 112-1 problems for which appropriate clarification by applicant is required:

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1) With respect to all of the currently pending claims, the following is hereby noted:

- a. All of the currently pending amended claims appear to be directed to methods of performing *primary* “error” correction and *secondary* “error” correction. However, where such “error correction” techniques have been described in applicant’s originally filed 1987 specification remains a mystery to the current examiner.
- b. In the paper filed 3/2/1998, applicant allegedly set forth section 112-1 support for the “error” correction processes that are now being claimed via the currently pending amended claims. However, in reading applicant’s citations of alleged section 112-1 support, the current examiner was unable to find any mention an “error correction” process. Out of desperation, the examiner resorted to a word search of the 1987 specification looking at each occurrence of the term: “error”. The examiner found that the last time that the word “error” was even used in the 1987 specification was on page 327. In contrast, all/much/most of applicant’s alleged section 112-1 support for the methods now being recited appear to come from sections of the 1987 specification that occur on page 470 and beyond [note the cited section 112-1 support for claim 5 on page 25 of applicant’s response]. The examiner is left to wonder whether it is possible to describe a process of performing primary and secondary forms of error correction without ever using the term “error” in their description.

Clarification is required.

2) With respect to claim 5, it is not clear where the disclosure as originally filed described:

- a. the actual “method of controlling a receiver station” that is referred to in line 1;
- b. the “information transmission” that is recited in line 4;
- c. the “**portion**” of said “information transmission” that is processed in lines 8 and 9;
- d. the “information” of line 12 that is received in said “information transmission” that is “reprocessed” to discern a failure;
- e. the “program” of line 5 that is contained within said “information transmission”;
- f. the “information” of line 10 that is contained in said “program” that is contained within said “information transmission”;
- g. the “memory” of line 10 to which the “information” in said program is passed;
- h. the “processor instructions” that are recited in line 4;
- i. the “secondary error correction routine” that is recited in lines 7 and 8;
- j. the step of receiving the “information transmission” of line 4, wherein the received “information transmission” includes “processing instructions” which, “in accordance with”,

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a receiver station is programmed to perform said “predetermined secondary error correction routine”

k. the “**incomplete** program element” that is recited in lines 11 and 12;

l. the “**incorrect** program element” that is recited in lines 11 and 12;

m. the step of “**discerning a failure**” that is recited in line 11-13, wherein:

1. the failure that is discerned by “reprocessing” information received in the information transmission; and

2. the failure that is discerned “evidences an **incomplete** program element”;

n. the step of “**discerning a failure**” that is recited in line 11-13, wherein:

1. the failure that is discerned by “reprocessing” information received in the information transmission; and

2. the failure that is discerned “evidences an **incorrect** program element”;

o. the “primary error correction routine” that is performed by the step recited in line 8 by processing “at least a portion” of the received information transmission of line 4.

Clarification is needed.

3) With respect to claim 6, it is not clear where the disclosure as originally filed described:

a. the “portion” of the memory that is cleared in line 3.

Clarification is needed.

4) With respect to claim 7, it is not clear where the disclosure as originally filed described:

a. the “program element” that is recited in line 3;

b. the recited step of “**placing**” data at said memory in order to “**complete**” the recited “program element” in consequence of said step of executing a predetermined secondary error correction routine;

c. the recited step of “**replacing**” data at said memory in order to “**complete**” the recited “program element” in consequence of said step of executing a predetermined secondary error correction routine;

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d. the recited step of “**placing**” data at said memory in order to “**correct**” the recited “program element” in consequence of said step of executing a predetermined secondary error correction routine;

e. the recited step of “**replacing**” data at said memory in order to “**correct**” the recited “program element” in consequence of said step of executing a predetermined secondary error correction routine.

Clarification is needed.

5) With respect to claim 8, it is not clear where the disclosure as originally filed described:

a. the “processor” of line 2 that is “interrupted” in accordance with the “**primary** error correction routine” of claim 5;

b. the “processor” of line 2 that is “interrupted” in accordance with the “**secondary** error correction routine” of claim 5.

Clarification is needed.

6) With respect to claims 9 and 10, it is not clear where the disclosure as originally filed described:

a. the step of “selecting a value” of claim 9 which “step of selecting” requires the computing of an address of a memory location that is “jumped” to.

Clarification is needed.

7) With respect to claim 11, it is not clear where the disclosure as originally filed described:

a. the recited step in which the “**functionality**” of “**one processor**” at a receiver station is “**instituted**” based on stored “history-of-efficiency information”;

b. the recited step in which the “**functionality**” of “**more than one processor**” at a receiver station “**instituted**” based on stored “history-of-efficiency information”;

c. the recited step in which the “**functionality**” of “**one processor**” at a receiver station is “**restored**” based on stored “history-of-efficiency information”;

d. the recited step in which the “**functionality**” of “**more than one processor**” at a receiver station is “**restored**” based on stored “history-of-efficiency information”.

Clarification is needed.

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8) With respect to claim 12, it is not clear where the disclosure as originally filed described:

a. the step of “**discerning a failure**” in which:

1. the failure is discerned by comparing information stored in a first memory location with information stored in a second memory location;
2. the failure that is discerned by “reprocessing” information received in the information transmission;
3. the failure that is discerned “evidences an **incomplete** program element”;

b. the step of “**discerning a failure**” in which:

1. the failure is discerned by comparing information stored in a first memory location with information stored in a second memory location;
2. the failure that is discerned by “reprocessing” information received in the information transmission; and
3. the failure that is discerned “evidences an **incorrect** program element”.

Clarification is needed.

9) With respect to claim 13, it is not clear where the disclosure as originally filed described:

a. the recited first and second “dedicated registers” at “**one processor**” of a receiver station;

b. the recited first and second “dedicated registers” at “**more than one processor**” of a receiver station;

Clarification is needed.

10) With respect to claim 14, it is not clear where the disclosure as originally filed described:

a. the “information” of line of line 3 that is processed in said step of performing primary error correction;

b. the step of “**discerning a failure**” in which:

1. the failure is based on the “information” processed in said step of performing primary error correction;
2. the failure that is discerned by “reprocessing” information received in the information transmission;
3. the failure that is discerned “evidences an **incomplete** program element”;

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c. the step of “**discerning a failure**” in which:

1. the failure is based on the “information” processed in said step of performing primary error correction;
2. the failure that is discerned by “reprocessing” information received in the information transmission; and
3. the failure that is discerned “evidences an **incorrect** program element”.

Clarification is needed.

10) With respect to claim 15, it is not clear where the disclosure as originally filed described:

- a. the “**incomplete** program element in said memory ” that is an “**incomplete** element of said received program”;
- b. the “**incomplete** program element in said memory ” that is an “**incorrect** element of said received program”;
- c. the “**incomplete** program element in said memory ” that is an “**a portion** of a second program”;
- d. the “**incomplete** program element in said memory ” that is an “**more than a portion** of a second program”;
- e. the “**incorrect** program element in said memory ” that is an “**incomplete** element of said received program”;
- f. the “**incorrect** program element in said memory ” that is an “**incorrect** element of said received program”;
- g. the “**incorrect** program element in said memory ” that is an “**a portion** of a second program”;
- h. the “**incorrect** program element in said memory ” that is an “**more than a portion** of a second program”.

Clarification is needed.

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11) With respect to claim 16, it is not clear where the disclosure as originally filed described:

a. the step of performing “**forward error correction**” on information to be “**outputted in**” said “program” before performing the steps of:

1. Performing a primary error correction routine; and

2. Discerning a failure:

A. by “reprocessing” information received in the information transmission; and

B. that “evidences an **incomplete** program element”;

b. the step of performing “**forward error correction**” on information to be “**outputted in**” said “program” before performing the steps of:

1. Performing a primary error correction routine; and

2. Discerning a failure:

A. by “reprocessing” information received in the information transmission; and

B. that “evidences an **incorrect** program element”;

c. the step of performing “**forward error correction**” on information to be “**outputted with**” said “program” before performing the steps of:

1. Performing a primary error correction routine; and

2. Discerning a failure:

A. by “reprocessing” information received in the information transmission; and

B. that “evidences an **incomplete** program element”;

d. the step of performing “**forward error correction**” on information to be “**outputted with**” said “program” before performing the steps of:

1. Performing a primary error correction routine; and

2. Discerning a failure:

A. by “reprocessing” information received in the information transmission; and

B. that “evidences an **incorrect** program element”.

Clarification is required.

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12) With respect to claim 17, it is not clear where the disclosure as originally filed described:

- a. the recited “**programming material**” that *IS selected* for outputting at the receiver station as part of the recited “**primary** error correcting routine”;
- b. the recited “**programming material**” that *IS NOT selected* for outputting at the receiver station as part of the recited “**primary** error correcting routine”.

Clarification is required.

13) With respect to claim 18, it is not clear where the disclosure as originally filed described:

- a. the recited “**programming material**” that *IS selected* for outputting at the receiver station as part of the recited “**secondary** error correcting routine”;
- b. the recited “**programming material**” that *IS NOT selected* for outputting at the receiver station as part of the recited “**secondary** error correcting routine”.

Clarification is required.

14) With respect to claim 19, it is not clear where the disclosure as originally filed described:

- a. The recited step in claim 5 of:
 1. receiving an information transmission containing processing instructions and “a program”;
 2. passing information contained in “said program” to a memory of the receiver station; and
 3. And discerning a failure evidencing and **incomplete** program element in said memory by reprocessing information contained in the information transmission that contains “said program”;

WHEREIN *said program* is a television program.

- b. The recited step in claim 5 of:
 1. receiving an information transmission containing processing instructions and “a program”;
 2. passing information contained in “said program” to a memory of the receiver station; and
 3. And discerning a failure evidencing and **incorrect** program element in said memory by reprocessing information contained in the information transmission that contains “said program”;

WHEREIN *said program* is a television program.

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c. The recited step in claim 5 of:

1. receiving an information transmission containing processing instructions and “a program”;
2. passing information contained in “said program” to a memory of the receiver station; and
3. And discerning a failure evidencing and **incomplete** program element in said memory by reprocessing information contained in the information transmission that contains “said program”;

WHEREIN *said program* is a radio program.

d. The recited step in claim 5 of:

1. receiving an information transmission containing processing instructions and “a program”;
2. passing information contained in “said program” to a memory of the receiver station; and
3. And discerning a failure evidencing and **incorrect** program element in said memory by reprocessing information contained in the information transmission that contains “said program”;

WHEREIN *said program* is a radio program.

e. The recited step in claim 5 of:

1. receiving an information transmission containing processing instructions and “a program”;
2. passing information contained in “said program” to a memory of the receiver station; and
3. And discerning a failure evidencing and **incomplete** program element in said memory by reprocessing information contained in the information transmission that contains “said program”;

WHEREIN *said program* is a computer program.

f. The recited step in claim 5 of:

1. receiving an information transmission containing processing instructions and “a program”;
2. passing information contained in “said program” to a memory of the receiver station; and

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3. And discerning a failure evidencing and **incorrect** program element in said memory by reprocessing information contained in the information transmission that contains "said program";

WHEREIN *said program* is a computer program.

g. The recited step in claim 5 of:

1. receiving an information transmission containing processing instructions and "a program";
2. passing information contained in "said program" to a memory of the receiver station; and
3. And discerning a failure evidencing and **incomplete** program element in said memory by reprocessing information contained in the information transmission that contains "said program";

WHEREIN *said program* is some of a combined medium program.

h. The recited step in claim 5 of:

1. receiving an information transmission containing processing instructions and "a program";
2. passing information contained in "said program" to a memory of the receiver station; and
3. And discerning a failure evidencing and **incorrect** program element in said memory by reprocessing information contained in the information transmission that contains "said program";

WHEREIN *said program* is some of a combined medium program.

Clarification is required.

15) With respect to claim 20, it is not clear where the disclosure as originally filed described the error correcting processes recited in claim 5 which further comprise:

- a. the recited step of *selecting* "**a program instruction**" that is to be processed to present combined medium programming;
- b. the recited step of *selecting* "**an intermediate generation set**" that is to be processed to present combined medium programming;
- c. the recited step of *selecting* a "**combining synchronizing command**" that is to be processed to present combined medium programming;

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- d. the recited step of *selecting* “**data**” that is to be processed to present combined medium programming.

Clarification is required.

16) With respect to claim 21, it is not clear where the disclosure as originally filed described:

- a. the recited “**portion**” of the primary and secondary error correction routines that is received in line 3 “with which the receiver station is programmed;
- b. the actual step of programming said receiver station with said recited “**portion**”.

Clarification is needed.

17) With respect to claim 22, it is not clear where the disclosure as originally filed described:

- a. the “remote station” that is recited in line 4;
- b. the “register” of line 7;
- c. the “re-programmable memory” of line 7;
- d. the recited “**portion**” of the primary and secondary error correction routines of line 3 **which is received from said “remote station”** of line 4;
- e. the step of *directing* said received “**portion**” of the primary and secondary error correction routines to “**a register**” of “**one processor**” of the receiving station;
- f. the step of *directing* said received “**portion**” of the primary and secondary error correction routines to “**a register**” of “**more than one processor**” of the receiving station;
- g. the step of *directing* said received “**portion**” of the primary and secondary error correction routines to “**a re-programmable memory**” of “**one processor**” of the receiving station;
- h. the step of *directing* said received “**portion**” of the primary and secondary error correction routines to “**a re-programmable memory**” of “**more than one processor**” of the receiving station;
- i. the actual step of storing “**some**” of said primary error correction routine and said secondary error correction routine at “**said register**” of said “one processor”;
- j. the actual step of storing “**some**” of said primary error correction routine and said secondary error correction routine at “**said re-programmable memory**” of said “one processor”.

Clarification is needed.

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18) With respect to claim 23, it is not clear where the disclosure as originally filed described:

- a. the “processor instruction” 5 that is recited in line 5;
- b. the “program” of line 6;
- c. the “portion” of said processor instruction and said program that is recited in line 5;
- d. the “information transmission” of line 4 that contains “only” said “portion” of said “processor instruction” and said “program”;
- e. the “transmission station” of line 4;
- f. The actual step of receiving an “information transmission” at said “transmission station”, wherein said received “information transmission” contains “only” said “portion” of said “processor instruction” and said “program”;
- g. “the remainder” of the processor instructions and the program that is generated in line 7;
- h. the step of transmitting the “information transmission containing said program and said processor instruction” that is recited in lines 9 and 10;
- I. the “predetermined secondary error correction routine” that is recited in line 11;
- I. the recited “processor instructions” of line 10-12 which program the receiver station to perform the “predetermined secondary error correction routine” in accordance with the instructions themselves;
- j. the “primary error correction routine” that is recited in line 13;
- k. the “portion” of the “information transmission” that is processed in line 13;
- l. the “program” of line 12, that is contained within the transmitted “information transmission”, which enables the receiver station to perform the “primary error correction routine” by the processing of the “portion” of the *transmitted* (?) “information transmission”;
- m. the “**incomplete** program element” that is recited in lines 14 and 15;
- n. the step of executing “a predetermined secondary error correction routine” that is recited in lines 16 and 17, wherein this secondary routine is executed in consequence of discerning a failure, wherein a failure was discerned in lines 14-16 that evidenced the “**incomplete** program element” by “reprocessing” information received in the “information transmission”;
- o. the “**incorrect** program element” that is recited in lines 14 and 15;

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p. the step of executing "a predetermined secondary error correction routine" that is recited in lines 16 and 17, wherein this secondary routine is executed in consequence of discerning a failure, wherein a failure was discerned in lines 14-16 that evidenced the "**incorrect** program element" by "reprocessing" information received in the "information transmission. Clarification is needed.

19) With respect to claim 24, it is not clear where the disclosure as originally filed described:

- a. the actual step of *receiving* the "information transmission" that is to be transmitted [e.g. line 4];
- b. the actual step of *receiving* the "instruct signal" of line 5, wherein said received instruct signal:
 1. effects a transmission station to generate a program;
 2. effects a receiver station to perform a primary error correction by processing a portion of said *received* (?) information transmission;
 3. effects a discerning of a failure evidencing an **incomplete** program element by reprocessing in formation received in said *received* (?) information transmission;
and
 4. effects the executing of a predetermined secondary error correction processing routine in consequence of the discerned failure;
- c. the actual step of *receiving* the "instruct signal" of line 5, wherein said received instruct signal:
 1. effects a **transmission station** to generate a program;
 2. effects a **receiver station** to perform a primary error correction by processing a portion of said *received* (?) information transmission;
 3. effects a discerning of a failure evidencing an **incorrect** program element by reprocessing in formation received in said *received* (?) information transmission;
and
 4. effects an executing of a predetermined secondary error correction processing routine in consequence of the discerned failure;
- d. the actual step of *receiving* the "instruct signal" of line 5, wherein said received instruct signal:
 1. effects a **receiver station** to generate a program;
 2. effects said **receiver station** to perform a primary error correction by processing a portion of said *received* (?) information transmission;
 3. effects a discerning of a failure evidencing an **incomplete** program element by reprocessing in formation received in said *received* (?) information transmission;
and
 4. effects an executing of a predetermined secondary error correction processing routine in consequence of the discerned failure;
- e. the actual step of *receiving* the "instruct signal" of line 5, wherein said received instruct signal:

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1. effects a **receiver station** to generate a program;
 2. effects **said receiver station** to perform a primary error correction by processing a portion of said *received* (?) information transmission;
 3. effects a discerning of a failure evidencing an **incorrect** program element by reprocessing in formation received in said *received* (?) information transmission; and
 4. effects an executing of a predetermined secondary error correction processing routine in consequence of the discerned failure;
- f. the “transmitter” of line 19;
- g. the “transmitter station” of lines 18 and 19;
- h. the “program” of line 19;
- I. the “transmitter control signal” of line 18 which operates at “said transmitter station” to communicate “said program” to “said transmitter”.
- j. the actual step of *receiving* the “transmitter control signal” that is recited in line 18;
- k. The actual step of *transmitting* :
1. said information transmission;
 2. said instruct signal that:
 1. effects a **transmission station** to generate a program;
 2. effects a receiver station to perform a primary error correction by processing a portion of said *received* (?) information transmission;
 3. effects a discerning of a failure evidencing an **incomplete** program element by reprocessing in formation received in said *received* (?) information transmission; and
 4. effects the executing of a predetermined secondary error correction processing routine in consequence of the discerned failure;
 - 3) said transmitter control signal;
[e.g. of lines 20 and 21]
- l. The actual step of *transmitting* :
1. said information transmission;
 2. said instruct signal that:
 1. effects a **transmission station** to generate a program;
 2. effects a receiver station to perform a primary error correction by processing a portion of said *received* (?) information transmission;
 3. effects a discerning of a failure evidencing an **incorrect** program element by reprocessing in formation received in said *received* (?) information transmission; and
 4. effects the executing of a predetermined secondary error correction processing routine in consequence of the discerned failure;

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3) said transmitter control signal;
[e.g. of lines 20 and 21]

m. The actual step of *transmitting* :

1. said information transmission;
2. said instruct signal that:
 1. effects **a receiver station** to generate a program;
 2. effects said receiver station to perform a primary error correction by processing a portion of said *received* (?) information transmission;
 3. effects a discerning of a failure evidencing an **incomplete** program element by reprocessing in formation received in said *received* (?) information transmission; and
 4. effects the executing of a predetermined secondary error correction processing routine in consequence of the discerned failure;
- 3) said transmitter control signal;
[e.g. of lines 20 and 21]

n. The actual step of *transmitting* :

1. said information transmission;
2. said instruct signal that:
 1. effects **a receiver station** to generate a program;
 2. effects said receiver station to perform a primary error correction by processing a portion of said *received* (?) information transmission;
 3. effects a discerning of a failure evidencing an **incorrect** program element by reprocessing in formation received in said *received* (?) information transmission; and
 4. effects the executing of a predetermined secondary error correction processing routine in consequence of the discerned failure;
- 3) said transmitter control signal;
[e.g. of lines 20 and 21]

Clarification is required

20) Claims 25-34 require similar clarifications as exemplified for claims 5-24 above. Additionally, it is not clear where the disclosure as originally filed described:

- A. The “audio programming” that is recited in line 5 of claim 25;
- B. The “mass medium programming” that is recited in line 4 of claim 25;
- C. The “portion” of the information transmission that is processed in lines 6 and 7 of claim 25 in order to perform “a primary error correction routine”;

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- D. The “information” that is contained in said mass medium programming which was passed to a memory by the passing step of lines 8 and 9 of claim 25;
- E. The step of discerning a failure of line 10 of claim 25 wherein the discerned failure evidences an **incomplete** mass medium programming element;
- F. The step of discerning a failure of line 10 of claim 25 wherein the discerned failure evidences an **incorrect** mass medium programming element;
- G. The “reprocessing” of information received in said information transmission as is recited in line 11 of claim 25;
- H. The executing of a “predetermined secondary error correction routine” as is recited in lines 13 and 14 of claim 25 wherein the execution is performed as a consequence of the discerned failure evidencing an **incomplete** mass medium programming element;
- I. The executing of a “predetermined secondary error correction routine” as is recited in lines 13 and 14 of claim 25 wherein the execution is performed as a consequence of the discerned failure evidencing an **incorrect** mass medium programming element;
- J. The “computer programming” that is recited in line 4 of claim 27;
- K. The “portion” of the computer programming that is processed in lines 6 and 7 of claim 27 in order to perform “a primary error correction routine”;
- L. The “information” that is contained in said computer programming which was passed to a memory by the passing step of line 8 of claim 27;
- M. The step of discerning a failure of line 9 of claim 27 wherein the discerned failure evidences an **incomplete** computer programming element;
- N. The step of discerning a failure of line 9 of claim 27 wherein the discerned failure evidences an **incorrect** computer programming element;
- O. The “reprocessing” of “said computer programming” as is recited in line 10 of claim 27;
- P. The executing of a “predetermined secondary error correction routine” as is recited in lines 12 and 13 of claim 27 wherein the execution is performed in accordance with said received computer;
- Q. etc,...

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SECTION V: other issues:

> Any inquiry concerning this communication should be directed to **David E. Harvey** whose telephone number is **(703) 305-4365**. The examiner can normally be reached Monday-Friday between the hours of 9:30 AM and 6:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Andrew Faile, can be reached at (703) 305-4380.

Any response to this action should be mailed to:

Commissioner of Patents and Trademarks
Washington, D.C. 20231


or faxed to:

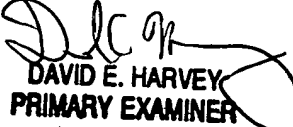
(703) 872-9314

Hand-delivered responses should be brought to Crystal Park II, 2121 Crystal Drive, Arlington, VA. Sixth Floor (Receptionist).

Any inquiry of general nature or relating to the status of this application or proceeding should be directed to the Technology Center 2600 Customer Service Office whose number is (703) 306-0377.

DEH 8/02


ANDREW FAILE
SUPERVISORY PATENT EXAMINER
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DAVID E. HARVEY
PRIMARY EXAMINER